EXQUISITE MERGE (M) SDN. BHD.

v.

LIFE PUBLISHERS BHD.

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
NH CHAN JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: W-02-314 OF 1994]
26 MARCH 1996

CONTRACT: *Agency - Goods sold and delivered - Wrong goods - Whether contract exists - Whether agent liable - Contracts Act 1950, s. 183(a)*

WORDS & PHRASES: *" Through" - Whether expression "through" in contract expressly extricated agent from personal liability*

The appellant and the respondent entered into a contract whereby the appellant supplied to the respondent newsprint printing paper. The supply delivered to the respondent was of a different quality and as a result it suffered damage.

The appellant admitted to this slip-up of supply by a faximile transmission but claimed that it was only acting as an agent for a disclosed principal and did not sign the contract as the seller. It contended that it acted as an indenting agent and therefor had no power to contract. It had by the expression "through" in the contract, expressly contracted out personal liability.

The learned Judge held the appellant to be liable and entered judgment in favour of the respondent. The appellant appealed.

Held:
Per Shaik Daud Ismail JCA

[1] The case fell under s. 183 (a) of the Contracts Act 1950 ('the Act') and the Agent was personally liable as a matter of statutory presumption, when it was proved that the agent was acting on behalf of his principal in respect of a contract for the sale and purchase of goods from a principal who was abroad.

[2] To escape liability there must be some express words in the contract or inference or by implication from some documentary evidence that the agent had contracted out of personal liability.

Per Mahadev Shankar JCA

[1] In each of the three situations in s. 183 the Act the law will presume that a contract exists between the two parties. An agent who contends that he is not liable must produce evidence to rebut the presumption.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

KONTRAK: *Agensi - Barang-barang dijual dan dihantar serah - Barang-barang yang salah - Samada wujudnya kontrak - Samada agen bertanggunagan - Akta Kontrak 1950, s. 183(a)*

PERKATAAN DAN UNGKAPAN: *"Through" - Samada perkataan "through" dalam kontrak telah secara nyata mengelak dari agen bertanggungan sendiri*

Perayu dan responden telah memasuki kontrak di mana perayu telah membekalkan kertas newsprint percetakan kepada responden. Akan tetapi kertas yang dibekalkan adalah berkualiti yang berlainan dan dengan itu mereka telah mengalami kerosakan.

Perayu telah mengaku bahawa ada kesilapan dalam pembekalan tersebut melalui transmisi faksimili tetapi telah menuntut bahawa ia hanya merupakan agen untuk prinsipal tak terdedah dan tidak menandatangani kontrak sebagai penjual. Ia menhujah bahawa ia bertindak sebagai "indenting" agen dan dengan itu tiada kuasa untuk berkontrak. Dengan perkataan "though" ia telah berkontrak untuk mengelak tanggungan sendiri.

Hakim yang arif telah memutuskan bahawa perayu adalah betanggungan dan memberi penghakiman untuk responden. Perayu telah merayu.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Kes ini jatuh di bawah s. 183(a) Akta Syarikat 1950 ('Akta') dan agen adalah bertanggungan sendiri dari segi anggapan statutori bila dibuktikan bahawa agen adalah bertindak bagi pihak prinsipal dalam sebuah kontrak jual beli barangan dari prinsipal yang berada di luar negeri.

[2] Untuk mengelak liabiliti mesti terdapat perkataan secara nyata atau inferens atau secara tersirat dari keterangan dokumentari bahawa agen telah berkontrak untuk mengelak tanggungan sendiri.

Oleh Mahadev Shankar HMR

[1] Dalam ketiga-tiga situasi di dalam s. 183, undang-undang akan membuat anggapan bahawa kontrak wujud antara dua pihak. Agen yang menghujah bahawa ia tidak bertanggunagan mestilah mengemukakan keterangan untuk mematahkan anggapan tersebut.

[Rayuan ditolak dengan kos.]

Cases referred to:
Medicon Plastic Industries Sdn. Bhd. v. Syarikat Cosa Sdn. Bhd. [1993] 2 MLJ 416 ***(foll)***
Khemano Textiles v. Gian Singh & Co. Ltd. [1963] 29 MLJ 360 ***(refd)***
Nandan Iron & Metal Industries v. Forestry Inc. AIR [1992] Delhi 364 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 183(a), (b), (c)

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: D5-22-55-1994]

For the appellant - Amritpal Singh; M/s. Khatijah Rauf & Co.
For the respondent - P.P. Naban (K.A. Gan with him); M/s. Lee Hishamuddin

JUDGMENT

Shaik Daud Ismail JCA:

This appeal is from the decision of the learned Judge who had granted final judgment to the respondent for a sum of RM211,358.01 together with interest at 10.25 per cent per annum from 23 November 1993 to the date of full realisation and costs. It is common ground that the respondent's claim arose from a contract where the appellant had agreed to supply newsprint printing paper to the respondent but the supply was defective as it was not to the specification agreed upon. As a result the respondent claimed they had suffered damage to the tune of RM211,358.01 as particularised in para. 8 of their statement of claim. It is also common ground that the sole issue to be decided is whether the appellant is liable. The appellant claimed that they were at all material time contracting as an agent for a disclosed principal and therefore they are not personally liable. It is the contention of the respondent that the relevant fact does not show the appellant contracted as an agent but even if they did so contract, they are not absolved from personal liability and would and could be held liable under the provisions of s. 183(a) of the Contracts Act 1950 (hereinafter referred to as 'the Act')

The learned Judge of the High Court relying on the decision of the then Supreme Court in *Medicon Plastic Industries Sdn. Bhd. v. Syarikat Cosa Sdn. Bhd.* [1993] 2 MLJ 416 held the appellant to be liable and entered judgment in favour of the respondent.

It is common ground that the appellant entered into the contract with the respondent on 17 June 1993 for the supply of 150 metric tonnes of Abitibi newsprint printing paper. However, the supply delivered to the respondent was of a different quality altogether and by a facsimile transmission of 16 October 1993 the appellants had admitted to the slip-up in the delivery. In the contract the respondent has been described as the buyer and consignee and the seller was Ekman International Incorporation of New York USA.

The appellant's only issue is that they were at all material times acting as an agent for a disclosed principal and therefore not personally liable. They had emphasised on the word "through" in the contract itself to show that they were merely acting as an agent. It is contended by the appellant that following the principle in the *Medicon's* case *(supra)*, they in fact had expressly contracted out of the contract. For this the appellant relied heavily on the expression "through" in the contract. It is contended that the appellant did not sign the contract as the seller and the expression "through" in the contract clearly indicated that they had expressly contracted out personal liability for the contract. At most it is contended that appellant is merely an indenting agent. In support the case of *Khemano Textiles v. Gian Singh & Co. Ltd.* [1963] 29 MLJ 360 was cited, where it was held that the plaintiffs therein acted as indenting agents were only acting on behalf of the foreign principals and had no power to contract. It must be borne in mind that in the present case it is not disputed the appellant did enter into contract with the respondent albeit on behalf of the foreign principal. A fortiori where appellant admitted the foul up in the delivery.

As this appeal revolves around s. 183 Contracts Act 1950 it is pertinent to set out and consider the provisions of that section:

Section 183 provides:

> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:

> (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> (b) where the agent does not disclose the name of his principal; and
>
> (c) where the principal, though disclosed, cannot be sued.

Clearly the present case falls under s. 183(a) of the Act. As the learned Judge followed the decision in *Medicon's* case *(supra)* it is also pertinent to see

whether the facts of that case is similar. In that case both the plaintiff and the defendants are locally incorporated companies. The plaintiff had purchased certain machines from the defendant for the purpose of making plastic bottles, and when the machines arrived from Switzerland, the plaintiff had complained that they were not fit for the purpose for which they were purchased, they were defective and not of merchantable quality. The defendant in their defence contended that there was no contract between them and the plaintiff and if a contract existed, it was between the plaintiff and the defendant's principal, a foreign company called UHAG Kebersee-Handel Ag. Zurish (UHAG for short). The High Court held that there was no contract in law between the plaintiff and defendant and that the defendant had merely arranged a contract which was entered into between plaintiff and UHAG and that the defendant was merely an agent. On appeal by the plaintiff the Supreme Court disagreed and in allowing the appeal held that s. 183(a) of the Act unmistakenly applied and that the agent is personally liable as a matter of statutory presumption. This presumption arises when it is proved that the agent is acting on behalf of his principal in respect of a contract for the sale and purchase of goods from a principal who is abroad.

It cannot be gainsaid that the facts of the present appeal is similar to the facts in the *Medicon's* case. Therefore applying the principle in *Medicon's* case, the appellant in the present appeal must be held personally liable for the contract which they admittedly entered with the respondent on behalf of the principal who is resident abroad. The Supreme Court in *Medicon* also considered the circumstances when such an agent can extricate itself from personal liability, where it held that the only way is either by express words or impliedly showing that the agent had in fact contracted out of such a statutory presumption or such personal liability. The Supreme Court found no such evidence in the *Medicon's* case.

In the present appeal it is contended that the expression "through" in the contract had expressly extricated the agent i.e. the appellant from personal liability. The learned Judge did not find favour with this contention when he held that that expression merely emphasised the fact that they were actually only the agent. I agree with this finding. I am of the considered view that the expression "through" in the contract cannot by any stretch of imagination, extricate the appellant from personal liability. There must be some express words or phrase in the contract to enable the appellant to escape liability, or impliedly, by necessary inference or by implication from some documentary evidence or surrounding circumstances showing that the agent had in fact contracted out of personal liability, or statutory presumption. I have not been shown such express words or any evidence to enable me to infer such extrication. Section 183(a) of the Act applied to the appellant and they are

personally bound by or could be sued personally on the said contract. In the light of this, I find myself in complete agreement with the learned trial Judge, I therefore dismiss the appeal with costs.

NH Chan JCA:

I agree that the appeal be dismissed with costs.

Mahadev Shankar JCA:

To the judgment of my brother YA Dato' Haji Shaik Daud bin Haji Mohd. Ismail I wish to add a few words of my own so as to ensure if possible, that the misconception of the appellant's Counsel is not repeated.

It was based on a misunderstanding of s. 183 of our Contracts Act. This may have had its genesis in the slightly different wording of s. 230 of the Indian Contracts Act. The text of that section is reproduced in *Nandan Iron & Metal Industries v. Forestry Inc. AIR* [1992] Delhi 364 at p. 365. **If** the text has been accurately reproduced there it is to be observed that the conjunction "and" which occurs after the semicolon in our s. 183(b) is missing. [I say "If' because the accuracy of the text is suspect. See the wording of s. 230(3) at p. 366 of the report which wrongly uses the word "discharge" when it ought to be "disclosed".]

This omission of the word "and" in the Indian section, and its inclusion in our s. 183(b) appears to have conveyed the impression to appellant's Counsel that it will be presumed that an agent is personally liable for contracts entered into on behalf of a principal **only** where all three situations spelt out in s. 183(a), (b) and (c) are cumulatively applicable. So it was submitted that because the contract documents showed that the appellant had made the contract as agent for Ekman, a merchant in New York [183(a) satisfied], and had disclosed his name [183(b) not satisfied] and Ekman New York could be sued [183(c) not satisfied] it could not be presumed that the parties had contracted to impose the appellant with personal liability for the non-fulfillment of its terms.

The numerous authorities on the point, of which the *Medicon* case is one, and a proper reading of s. 183 shows that the construction placed by the appellant's Counsel is wholly misconceived.

Each of the presumptions in s. 183(a), (b) and (c) stands by itself. Where a contract is being concluded by two parties, both within Malaysia, the rule is that if one of them is known by the other to be contracting as an agent then he cannot sue or be sued on the contract. If in such circumstances the agent is to be invested with capacity to sue, and/or with personal liability for default there has to be a contract to that effect which has to be proved.

In each of the three situations in s. 183 the law will presume that such a contract exists. It is to be noted that only s. 183(a) refers to a position where the Malaysian agent is buying or selling goods for a party resident abroad. Sections 183(b) and (c) could equally apply where all parties are in Malaysia at the time the contract is concluded.

In each of these situations an agent who contends that he is not liable must produce evidence to rebut the presumption. The issue in this case was not whether s. 183(a) applied – obviously it did. It was whether the presumptive liability imposed upon the appellant had been rebutted.

The trial Judge has admirably set out the salient facts and the law applicable. He held there was no evidence to rebut the presumption. This appeal was therefore devoid of merit and was dismissed with costs.

Reported by Michele Saw